86-1868

No. _____

Supreme Court, U.S.
FILED
MAY 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ATLANTIC RICHFIELD CO.,

Petitioner,

—against—

INTERSTATE OIL TRANSPORT CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals misapply the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure by overturning the independent findings of two district court judges that an agreement of settlement was fair and reasonable?

2. Did the Court of Appeals exceed its authority under Rule 52(a) of the Federal Rules of Civil Procedure in rejecting as clearly erroneous the district court's finding that notice of a proposed settlement was adequate, where the evidence supported two permissible views?

3. Did the Court of Appeals subject the district court's findings of "ultimate" fact based on inferences and conclusions from undisputed documentary evidence to more stringent review than permitted by the 1985 Amendment to Rule 52(a) of the Federal Rules of Civil Procedure?

PARTIES

The parties to this proceeding are Atlantic Richfield Company (hereinafter "Atlantic") and Interstate Oil Transport Company (hereinafter "Interstate"). Pursuant to Supreme Court Rule 28.1, Atlantic's subsidiaries and affiliates are set out at page 54a of the Appendix.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, which is not yet officially reported, is reproduced at pages 1a-23a of the Appendix. The opinion of the United States District Court for the Southern District of New York is not reported officially. It is reproduced at pages 24a-39a of the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit, of which review is sought, was entered on February 14, 1986. (Appendix, page 41a). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The federal courts below had jurisdiction of this admiralty cause under 28 U.S.C. §§ 1333 and 1291.

RULE INVOLVED

Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

STATEMENT OF THE CASE

In 1972, petitioner Atlantic orally time chartered the tank barge Ocean 80 from respondent Interstate, its disponent owner, to transport Atlantic's cargo of gasoline and fuel oil stored at a Carteret, New Jersey oil storage facility owned by General American Transportation Company (hereinafter "American"). These products were stored pursuant to a lease agreement between American and Atlantic.

During the loading of the barge at American's terminal on October 25, 1972, a fire broke out which caused the barge to explode, destroying Atlantic's cargo and causing millions of dollars worth of damage to the American facility and the property of third parties.

In April 1973, Interstate filed a petition for exoneration from or limitation of liability. In the limitation proceeding, American filed a claim for $5,000,000 for loss and damage to

its property, loss of use and business interruption and for reimbursement of amounts it might have to pay to third parties. Atlantic filed a claim in the amount of $233,699.75 for loss of its cargo. Other claimants filed claims in the limitation proceedings against both Interstate and American.

Interstate brought a separate action against American to recover for the loss of its barge. Atlantic also filed a separate suit against American for its cargo loss, and American filed a counterclaim, seeking to recover from Atlantic for the damage to its facility and for indemnfication for amounts it might have to pay third parties. American claimed recovery from Atlantic by reason of its lease agreement, paragraph 7 of which provided as follows:

> Lessor [American] shall in no event, be liable for loss or damage to Lessee's [Atlantic's] Commodities or property, except when caused by Lessor's failure to use reasonable care in the safekeeping and handling of Lessee's Commodities or property. Lessee shall exonerate, indemnify and save harmless Lessor from and against any liability for damage of the property of Lessee, Lessor or others, liability for injury (including death) to persons (including employees of Lessor) and all claims or actions in connection with such damage, based upon, arising out of or occurring in connection with the deposit or withdrawal of Lessee's material, except such claims as arise out of Lessor's failure to use reasonable care in the safekeeping and handling of the Lessee's Commodities or property.

The U.S. Coast Guard and the National Transportation Safety Board (hereinafter "NTSB") conducted an extensive investigation into the casualty. Both the Coast Guard and the NTSB determined that the probable cause of the explosion was the ignition, by an unidentified source, of a gasoline spill on the deck of the barge.

In December 1976, Interstate and American reached a settlement agreement, a copy of which is set forth at pages 42a-46a

of the Appendix. Paragraph 3 of the settlement agreement provided as follows (emphasis added):

> Ocean 80 Co. and Interstate Oil Transport Company will pay the sum of One Million Dollars ($1,000,000) to General American Transportation Corporation *for its property damage.*

American in turn agreed to waive its claim for damages sustained to its facility resulting from the fire and explosion aboard the barge. The settlement agreement also stated (paragraph 4) that three of the third-party claims had been settled and paid by American for $900,000; with regard to the remaining third-party claims, Interstate agreed to contribute an additional amount if American were required to pay more than was expected in settlement of the claims, and American agreed to indemnify Interstate from liability in excess of that amount.

Pursuant to the settlement (paragraph 5), Atlantic's claim against Interstate in the limitation proceeding, Atlantic's claim against American for cargo loss, and American's counterclaim against Atlantic for its property damage and for indemnification were to continue in litigation. American agreed that if Atlantic recovered from Interstate for the cargo loss, American would indemnify Interstate for any sums found to be due from Interstate to Atlantic. Finally, Interstate agreed to cooperate with American in the limitation proceeding and in the defense of "any and all pending actions arising from the fire and explosion on October 25, 1972 as if petitioning or defending for their own account."

The remaining third-party claims were subsequently settled and in May 1977 an order was entered in the limitation proceeding concluding that proceeding and providing that (1) the claims and counterclaims set forth in Atlantic's action against American be continued and (2) Atlantic's action against Interstate be discontinued without prejudice to Atlantic's right, upon conclusion of its suit against American, to bring a further action against Interstate in which Atlantic

could assert any claim it had immediately prior to the May 1977 order, with the further right of Interstate to assert the partial defense of limitation of liability.

Atlantic's action against American proceeded to trial on November 28, 1977. After two days of trial, Atlantic and American decided to settle their claims. According to the terms of the proposed settlement Atlantic's claim against American was to be dismissed and American's $5,000,000 counterclaim was to be settled by Atlantic's payment of $500,000. On the evening of the second day of trial, when the terms of the proposed settlement had been negotiated, but before the settlement had been consumated, Atlantic's trial counsel communicated with Interstate's counsel in Philadelphia to inform him of the settlement. Interstate's attorney neither approved nor disapproved the settlement. Atlantic subsequently entered into the settlement with American. The trial judge specifically found that the settlement was fair and reasonable both as to liability and amount. A copy of the court's Judgment Order is set forth at page 47a of the Appendix.

On March 3, 1978, Atlantic commenced the present admiralty and maritime action against Interstate in the United States District Court for the Southern District of New York seeking indemnity for the $500,000 which it paid to American.

The case was heard at a non-jury trial in February 1982. The trial presented conflicting evidence on two critical fact issues. First, Atlantic contended that the settlement between Atlantic and American was fair and reasonable. Atlantic paid American $500,000 on the latter's counterclaim of $5,000,000, which was an accurate reflection of Atlantic's potential liability and the amount of its exposure. The judge at the earlier Atlantic-American trial had approved the settlement as fair and reasonable. Interstate, on the other hand, claimed that American's negligence contributed to the loss, and that such negligence precluded any recovery from Atlantic under the terms of the lease agreement between Atlantic and American. Second, Atlantic asserted that Interstate had sufficient notice of Atlantic's settlement with American. Having instituted the earlier

limitation proceeding and having been a party to its resolution, Interstate knew of the ongoing litigation between Atlantic and American and was aware of the nature of the claims asserted by both. After the second day of trial of those issues, Interstate's counsel was notified of the terms of the proposed settlement. Interstate, however, claimed that the notice was inadequate because no tender of the defense or claim for indemnity had ever been made by Atlantic prior to the settlement with American.

The district court resolved both of these factual disputes in favor of Atlantic. In its opinion dated April 11, 1985, the court held that the settlement entered into between Atlantic and American was fair and reasonable. It found that Atlantic, pursuant to Clause 7 of its lease agreement with American, was to indemnify American for all losses except those which occurred as a result of American's failure to use reasonable care in the storage or handling of Atlantic's property; that Atlantic would probably not have been able to prove a causal connection between any negligence on American's part and its loss; and that the settlement was for less than American's counterclaims.

The district court also held that Interstate was given adequate notice of the settlement in light of the particular facts of the case. The court found that Interstate was on notice of the continuing litigation between Atlantic and American; that Interstate was therefore aware that its negligence could be the basis for a judgment against Atlantic and in favor of American; and that the tendering of the defense of American's counterclaims to Interstate would have been a useless act, since Interstate was bound by stipulation to assist American in the defense of any actions arising out of the casualty. The court emphasized that Interstate presented no evidence as to why it neither approved nor disapproved the settlement. In the absence of such evidence, the court refused to infer that Interstate would have disapproved the settlement.

The district court concluded on the basis of the foregoing facts that Atlantic was only required to establish its potential, not its actual, liability to American, and that Atlantic had met that burden.

On appeal the United States Court of Appeals for the Second Circuit reversed as "clearly erroneous" the district court's factual findings that Atlantic's notice to Interstate was adequate and that the amount of Atlantic's settlement was fair and reasonable. Because, according to its view of the evidence, Atlantic was not even potentially liable to American, the Second Circuit decided that it need not remand to the district court for a finding on the issue of actual liability and dismissed Atlantic's complaint.

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted to Review The Second Circuit's Finding of "Clear Error" in the Independent Findings of Two U.S. District Courts.

The Court of Appeal's decision in this case is an object lesson in the njustice that may arise when an appellate court ignores the limited scope of review established by Rule 52 of the Federal Rules of Civil Procedure, *and itself commits plain error in its reading of an undisputed document.*

In two separate actions, two U.S. district court judges were asked to rule upon the reasonableness of the settlement agreement between Atlantic and American. At the conclusion of the trial between Atlantic and American, Judge William C. Conner entered a judgment order in which he specifically found that the settlement was reasonable both as to liability and amount (Appendix, page 48a). In the subsequent trial between Atlantic and Interstate, Judge Vincent L. Broderick was called upon to review the terms of the same settlement agreement. Judge Broderick also found, independently, that the settlement was fair and reasonable (Appendix, page 27a).

The Second Circuit reviewed the same settlement agreement that was before Judge Conner and Judge Broderick and found that the settlement was not reasonable because, in its view, there was no liability to American on the part of Atlantic. The Second Circuit interpreted paragraph 7 of the Atlantic-American lease agreement as creating liability on Atlantic's part only with regard to third-party claims against American, and not for damage to American's own property. If the Second Circuit's reversal had rested on this ground alone, it would not, of course, have violated Rule 52. It is well settled that matters of contract interpretation present questions of law. Appellate review of such questions is not limited by the "clearly erroneous" rule.[1]

The Second Circuit's reversal was not based, however, on its interpretation of the lease agreement, but on an erroneous reading of an undisputed document: the settlement agreement between Interstate and American. Noting that the record revealed that the settlement of all the third-party claims against American amounted to $949,180, the court found (Appendix, page 18a) that "Interstate's settlement of $1,000,000 with American reflected reimbursement for a significant amount of these third party payments". The Second Circuit therefore concluded that Atlantic acted as a volunteer in settling with American, since the lease agreement rendered Atlantic liable to indemnify American only for the third-party claims, which had already been settled by Interstate's payment of $1,000,000. In so holding the Second Circuit completely misread the unambiguous language of paragraph 3 of the settlement agreement, which stated that Interstate paid the $1,000,000 to American *for its property damage*, and not as reimbursement of the third-party payments. The evidence therefore established that American's counterclaims included unreimbursed payments to third parties and that Atlantic's (*not* Interstate's) settlement reflected reimbursement for these third-party payments. Thus,

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[1] *Thornton v. Bean Contracting Co.*, 592 F.2d 1287 (5th Cir. 1979); *Teamsters Local Union No. 688 v. Crown Cork & Seal Co.*, 488 F.2d 738 (8th Cir. 1973).

there was ample support for the district court's finding that Atlantic was potentially liable to American pursuant to the lease agreement, and that its settlement for approximately ten percent of American's claim was fair and reasonable. These findings were not, therefore, "clearly erroneous".

A decision of an appellate court which disregards the findings of not one, but two, trial courts should be subject to the closest scrutiny under Rule 52. As the Court stated in *Rogers v. Lodge*, 458 U.S. 613, at 623: ". . . this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts." The Second Circuit should not be held to a lesser standard, particularly where, as here, its *de novo* review of the lower court's fact findings resulted in plain error.

II. Certiorari Should Be Granted Because the Trial Court's Choice Between Two Permissible Views of the Weight of the Evidence Was Not Clearly Erroneous.

The second ground for the Court of Appeals' reversal was its finding that Atlantic's notice to Interstate of the settlement agreement did not afford Interstate an opportunity to assume the defense. The court noted its agreement with the lower court (Appendix, pages 15a-16a) that Atlantic's failure to tender the defense of American's counterclaims to Interstate was not by itself a serious omission in view of Interstate's agreement to cooperate with American in the defense of any pending action arising from the casualty. The court found, however, that the failure to tender the defense, coupled with the 24-hour notice of the settlement, violated equitable indemnity principles. The court found that the district judge who approved the Atlantic-American settlement "did not receive the benefit of the kind of adversarial presentation . . . that would have been provided had Interstate been impleaded and appeared as a third party defendant in the action." (Appendix, page 22a).

The Second Circuit's finding of inadequate notice in this case again illustrates the dangers inherent in appellate review of factual issues *de novo*. The Second Circuit once again

overlooked an important portion of the record which set forth the text of the order terminating Interstate's limitation proceeding. That order is set forth at pages 50a-53a of the Appendix. The order provided (Appendix, page 52a) that Atlantic could pursue its rights against Interstate *upon the conclusion* of the litigation between Atlantic and American. Thus Atlantic, by court order, was effectively precluded from impleading Interstate on American's counterclaim. Interstate could not have appeared, as the Second Circuit believed, as a third-party defendant.

Regarding Interstate's notice of the proposed settlement between Atlantic and American, the trial court made a number of subsidiary findings of fact which were not challenged by the Second Circuit or by Interstate. The trial court found (Appendix, page 29a) that Interstate was on notice of the continuing litigation between Atlantic and American and Atlantic's right to proceed against it upon the termination of that litigation. The trial court also found (Appendix, page 29a) that Interstate was aware that its negligence could possibly be the basis for a judgment against Atlantic and in favor of American. Finally, the court found (Appendix, page 29a) that the duration of the settlement negotiations was not known but that the settlement was finally agreed upon on the night of the third day of trial. Atlantic and Interstate had stipulated that notice of the proposed settlement was given after two days of trial. Viewing all the above uncontroverted evidence as a whole, the trial court concluded that the notice to Interstate was sufficient.

In *Anderson v. City of Bessemer City, North Carolina*, ____ U.S. ____, 53 U.S.L.W. 4314 (1985), this Court held (p. 4317):

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the Court of Appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

The district court's conclusion that notice to Interstate was sufficient represents precisely the situation contemplated above where the trier of fact has chosen between two permissible views of the evidence based on the record as a whole. This choice should not have been disturbed by the Court of Appeals.

III. Certiorari Should Be Granted Because the Second Circuit's Decision Violates the 1985 Amendment to Rule 52(a), Which Mandates That Findings of Fact Based on Documentary Evidence Be Protected by the Clearly Erroneous Standard.

In *Anderson v. City of Bessemer City, North Carolina*, *supra*, at p. 4317, this Court unequivocally held that the "clearly erroneous" standard of Rule 52(a) applies to all categories of factual findings, including those based on documentary evidence or inferences from undisputed basic facts. In 1985, Rule 52(a) was amended to state the full scope of that standard as articulated in *Anderson*. Rule 52(a) now provides that findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous. The amendment was intended to avoid continued conflict among the circuits as to the standard of appellate review of findings of fact and to eliminate disparity between the standard of review as literally stated in Rule 52(a) and the practice of some courts of appeals. Advisory Committee Note of 1985 to Subdivision (a). In *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), this Court also held that Rule 52 does not distinguish between findings that deal with "ultimate" facts and those that deal with "subsidiary" facts. The Court of Appeals' decision in this case, although purporting to follow the "clearly erroneous" standard, seriously conflicts with Rule 52(a), as amended, and both of the above decisions.

This Court recognized in *Pullman* that the extent of compliance with Rule 52 must be ascertained by examining the actual decision of a Court of Appeals, not by reliance on a *pro*

forma recitation of the "clearly erroneous" standard. 456 U.S. at 291-93.

In the instant case, the majority of the evidence upon which the district court based its findings was undisputed documentary evidence. Implicit in the Second Circuit's reversal is the notion that the appellate court deemed itself in as good a position as the trial court to interpret the evidence and to declare the trial court's findings of fact based on such evidence clearly erroneous, a view endorsed in many Second Circuit opinions prior to the 1985 amendment to Rule 52(a). *See, e.g., Taylor v. Lombard*, 606 F.2d 371, 372 (2d Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); *Jack Kahn Music Co. v. Baldwin Piano & Organ Co.*, 604 F.2d 755, 758 (2d Cir. 1979). This view is now impermissible under Rule 52(a). Moreover, with respect to the issue of the adequacy of the notice of settlement, the Second Circuit did not challenge any of the trial court's basic findings, but simply disagreed with the ultimate finding that such notice was adequate. The Second Circuit's decision thus threatens a return to the view, rejected in *Anderson* and *Pullman*, that appellate courts are freed from the sanction of Rule 52 whenever the trial court's finding of "ultimate" fact is based on conclusions from documentary or undisputed facts.

As this Court noted in *Anderson* (p. 4317):

> The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.

In short, the entire responsibility for deciding the doubtful fact questions in this case was, and should have been, that of the district court.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 350—August Term, 1985

(Argued October 28, 1985 Decided February 14, 1986)

Docket No. 85-7550

ATLANTIC RICHFIELD CO.,

Plaintiff-Appellee,

—v.—

INTERSTATE OIL TRANSPORT CO.,

Defendant-Appellant.

B e f o r e :

MESKILL, CARDAMONE and WINTER,

Circuit Judges

Appeal by Interstate Oil Transport Co. from a judgment of the United States District Court for the Southern District of New York, Vincent Broderick, Judge, awarding $500,000 plus $420,454.57 in prejudgment interest in

favor of Atlantic Richfield Company on its indemnity claim against appellant Interstate.

Reversed.

GEORGE R. DALY, New York, New York (James D. Yellen, Bigham Englar Jones & Houston, New York, New York, of counsel), *for Defendant-Appellant*.

THOMAS F. MOLANPHY, New York, New York (Charles B. Anderson, Haight, Gardner, Poor & Havens, New York, New York, of counsel), *for Plaintiff-Appellee*.

CARDAMONE, *Circuit Judge*:

This appeal involves a claim for indemnity arising from a marine casualty. A time charterer of a gasoline tank barge that suffered a cargo loss sued a terminal owner claiming that its personnel's negligence in loading the cargo caused the loss. The terminal owner cross-claimed for the millions of dollars of property damages it sustained. During the trial, the time charterer paid the terminal owner $500,000 in settlement of its counterclaim. It then sought indemnity from the party from which it had time-chartered the vessel. Following a trial on the indemnity claim, the district court granted full indemnity to the time charterer reasoning that it did not

need to show actual liability to the terminal owner in order to recover the amount it paid in settlement. Instead, the district court believed that the potential liability which it found was all that was required. We reverse.

I BACKGROUND

A. *Facts and the Parties*

At approximately 6:10 a.m. on October 25, 1972 an explosion occurred aboard the six-year old steel tank barge "OCEAN 80" moored at the General American Transportation Corporation Terminal at Arthur Kill in Carteret, New Jersey. The OCEAN 80 was loading gasoline and fuel oil at the time of the explosion and the subsequent fire destroyed and sank the barge and caused millions of dollars worth of damage to the terminal and nearby facilities. The shock of the explosion broke windows a mile from the scene, but there was no loss of life and only minor injuries.

This appeal involves three of the parties involved in the ensuing litigation: Interstate Oil Transport Company (Interstate), Atlantic Richfield Company (Atlantic), and General American Transportation Company (American). Interstate was the bareboat charterer of the tank barge OCEAN 80, from its owner Ocean 80 Co. Under such charter Interstate was in possession and command of the barge, and stood in the shoes of its owner. *See Guzman v. Pichirilo*, 369 U.S. 698, 700 (1962). Several months prior to the October casualty, Interstate orally time-chartered the OCEAN 80 to Atlantic, which had chartered tank barges from Interstate for a number of years. A year earlier, on August 10, 1971, Atlantic leased storage facili-

ties from American, including several tanks at Carteret, where it stored gasoline and fuel oil.

The incident occurred while Interstate and American employees were in the process of withdrawing these commodities from storage and pumping them into the tank barge OCEAN 80. As a result of the explosion, Interstate's tank barge was destroyed, Atlantic's cargo was lost and American's terminal facilities suffered extensive damages as did the property of third parties.

B. *Prior Legal Proceedings*

In 1973 Interstate and Ocean 80 Co. petitioned for exoneration from, or limitation of, liability. Atlantic filed a claim for $233,699 against Interstate and American for the loss of its cargo. American counterclaimed against Atlantic for $5,000,000 damages to its facility and for indemnification for amounts to third parties to which it might be found liable. American had previously filed an identical claim against Interstate in the limitation proceeding. Interstate and Ocean 80 Co. brought an action against American to recover for the loss of the barge. Additionally, third parties filed claims in the limitation proceedings against both Interstate and American. The central issue in these proceedings was to fix blame for the casualty thereby determining liability.

Central to the resolution of this question were the Findings and Conclusions of the United States Coast Guard (Coast Guard) and the National Transportation Safety Board (NTSB) both of which investigated the loss. In the NTSB's Findings and Conclusions it stated:

> [T]he probable cause of the casualty was the ignition, by an unidentified source, of gasoline which spilled

> from overflowing cargo tanks on the OCEAN 80. A major contributing factor was the failure of the barge tankerman and the terminal dockman to adhere to prescribed cargo transfer procedures.

Neither the tankerman nor the dockman had been directed to be continually present in the area of their responsibility. Their absence, the NTSB report noted, "precluded any attempt to take desired action."

The NTSB report listed the following defects in the loading procedures: the American dockman did not know the gasoline pumping rate and there was no metering device available at the terminal; the absence of qualified fire-fighting personnel at the American terminal delayed initial fire-fighting efforts which "might have prevented some of the extensive damage"; there was no valve status checkoff list maintained at the terminal; and the position of the various valves (open or closed) could only be determined by manual manipulation. Coast Guard regulations then in effect required the terminal to keep the transfer operation under "continuous control and surveillance" and to know the flow rate of the product. 33 C.F.R. 126.15(0).

The Coast Guard Marine Board of Investigation similarly determined that the ignition of gasoline on the barge's deck caused the casualty. Although the ignition source was unidentified, the Coast Guard suspected one of the barge's several non-explosion proof electrical fixtures. The Coast Guard also concluded "that the absence of the tankerman precluded any action on his part to prevent the overflow," which was an "important and a major contributing cause of the casualty." The Coast Guard made several findings of fact concerning the

barge's and the terminal's operation: upon its arrival at the American facility the barge was empty but not gas free; the facility had no permanent plant fire department and an insufficient number of personnel to fully man the equipment during the night shift; a search of the barge conducted after the explosion revealed a number of electrical appliances of "questionable approval for marine use"; a discharge valve normally closed during loading operations was found frozen in the open position; there was no guard or other security system in operation during nighttime hours; there was no fire or safety patrol at the facility; there was no means by which a supervisor could be constantly informed as to the status of the valves, equipment and the movement of product at all locations in the facility; and that "[t]estimony of several witnesses responsible for the safety, repair, maintenance and operation of the OCEAN 80 indicate[d] a general lack of understanding as to what constitute[d] Coast Guard 'approval.' "

In December 1976 after discovery had been concluded in the limitation proceeding, Interstate, Ocean 80 Co., Aetna Insurance Company (Aetna), and American reached a settlement agreement. Under its terms: (1) Interstate and Ocean 80 waived any claims against American for the loss of the barge OCEAN 80; (2) American and Aetna waived any claims against Ocean 80 Co. and/or Interstate for damages to American's facility arising out of the fire; (3) Ocean 80 Co. and Interstate paid $1,000,000 to American for its property damage; (4) three of the third-party claims were settled for $900,000 paid by American; with regard to the remaining third-party claims, Interstate agreed to contribute an additional $125,000 if American was required to pay more than

$350,000 in settlement of those claims, and American agreed to indemnify Interstate from liability in excess of this amount; (5) Atlantic's claim for cargo loss brought against Ocean 80 Co., Interstate, and American and American's counterclaim against Atlantic were to continue in litigation; (6) in the event Atlantic recovered against Ocean 80 Co. and/or Interstate for its cargo loss, American agreed to indemnify and hold harmless Ocean 80 Co., the barge OCEAN 80, and Interstate for whatever sums may be due to Atlantic for the cargo loss; and (7) in consideration of this indemnification agreement, Interstate agreed to cooperate with American in the limitation proceeding and in the defense of "any and all pending actions arising from the fire and explosion on October 25, 1972 as if petitioning or defending for their own account."

The remaining third-party claims were subsequently settled and in May 1977 an order was entered in the limitation proceeding providing that: all parties except Atlantic having claims against Interstate arising out of the explosion were perpetually enjoined from instituting such suits; Atlantic's claim against American and American's $5,000,000 counterclaim were to proceed; Atlantic's claim against Interstate for the cargo loss was discontinued without prejudice to Atlantic's right to assert any claim it had immediately prior to the entry of the order; and all claims asserted against Interstate were dismissed.

Atlantic's action against American proceeded to trial before United States District Court Judge Conner on November 28, 1977. After three days of trial the parties agreed to settle. An Order was signed on December 2, 1977 embodying the settlement agreement. Under its terms Atlantic waived its claim for cargo loss and agreed

to pay $500,000 to American in settlement of American's $5,000,000 counterclaim. The district court judge found this agreement a "fair and reasonable settlement of [the] litigation both as to liability and amount." The Order of settlement stated:

> [I]t appears that [Atlantic] may be unable to sustain its burden of proving a causal relationship between any lack of reasonable care on the part of [American] in the handling of [Atlantic's] products and the loss thereof and . . . the Coast Guard Marine Board of Investigation found contributory fault on the part of employees of [Interstate], operator of the Barge OCEAN 80, and . . . it appears that [Atlantic] may be responsible to [American] for any negligence on the part of [Interstate], Ocean 80 Company or employees thereof, even without any other showing of negligence on the part of [Atlantic] . . . .

The only notice Atlantic provided to Interstate of the settlement or of Atlantic's intent to claim indemnification was a telephone call made the night before the settlement was concluded. Atlantic's attorney in New York City called Interstate's attorney in Philadelphia advising him that a settlement was going to take place the next day. Interstate's attorney neither approved nor disapproved the settlement. Atlantic did not tender the defense of the action to Interstate. Prior to this conversation Atlantic had not made an indemnity claim against Interstate; the only claim Atlantic had ever made was for cargo loss.

C. *Instant Action*

On March 3, 1978 Atlantic commenced the instant indemnity action against Interstate in the Southern District of New York seeking to recover the amount of its $500,000 settlement with American. At the trial held before Judge Broderick, deposition testimony taken at the Coast Guard hearing and during discovery in the limitation proceeding was relied upon extensively. After trial, the district court held:

1. Atlantic did not have to prove its actual liability to American, only its potential liability. The district court reasoned that Atlantic had provided Interstate with sufficient notice and opportunity to defend. The court further stated that because Interstate and American had agreed to cooperate in defending the cargo claim asserted against both by Atlantic, Atlantic's failure to tender defense of the counterclaim asserted by American was reasonable. The court concluded that Atlantic carried its burden of proving its potential liability to American.
2. The settlement between Atlantic and American in which Atlantic surrendered its claim for cargo damage and paid $500,000 to American was reasonable.
3. The release by American of any and all claims against Interstate and the dismissal of any and all claims of American did not preclude either American from suing Atlantic for a loss allegedly caused solely by Interstate's negligence or Atlantic from claiming in indemnity against Interstate for its payment to American.

4. The tank barge OCEAN 80 was unseaworthy and Interstate breached its warranty of seaworthiness.
5. Under paragraph seven of the August 1971 lease agreement between Atlantic and American, Atlantic was obligated to indemnify American.
6. Interstate failed to meet its burden of proving that the statutory violations of its tankerman could not have caused the explosion.
7. Interstate breached its personal warranty of seaworthiness and was not entitled to limit its liability.

From this judgment that indemnified Atlantic for $500,000 plus $420,454.57 in prejudgment interest, Interstate appeals.

II POTENTIAL LIABILITY

We first address Interstate's argument that the district court erred in holding that Atlantic did not have to prove its actual liability to American. The district court held that Atlantic's burden was merely to establish its potential liability, which the court found that it had met. This determination was based upon its finding "that the notice plaintiff [Atlantic] gave to defendant [Interstate] of its settlement with American was adequate." We are unable to agree with the district court's conclusion that this notice satisfied due process requirements and that therefore only potential liability need be shown.

Courts have traditionally required a showing of potential liability only in cases where the indemnitor has been impleaded as a third party defendant and tendered defense prior to settlement, *Damanti v. A/S Inger*, 314 F.2d

395, 396-97 (2d Cir.), *cert. denied sub nom., Daniels & Kennedy, Inc. v. A/S Inger*, 375 U.S. 834 (1963), or was impleaded and continuously informed of settlement negotiations or offered an opportunity to defend, *Parfait v. Jahncke Service, Inc.*, 484 F.2d 296, 304-05 (5th Cir. 1973), *cert. denied sub nom., Home Indemnity Co. v. Ruppel and Ruppel v. Travelers Indemnity Co.*, 415 U.S. 957 (1974), or was adequately protected by continuing notice concerning the progress of settlement obligations and had a sufficient opportunity to approve or disapprove the settlement. *Burke v. Ripp*, 619 F.2d 354, 357-58 (5th Cir. 1980). In contrast, proof of actual liability has been required where the indemnitor was neither tendered defense of the claim nor informed of the settlement until after its conclusion, *Tankredereit Gefion A/S v. Hyman-Michaels Company*, 406 F.2d 1039, 1042-44 (6th Cir. 1969), the indemnitor was not tendered defense and did not participate in the settlement negotiations or approve the agreement. *Whisenant v. Brewster-Bartle Offshore Company*, 446 F.2d 394, 402-03 (5th Cir. 1971).

In *Parfait*, involving an action by a contractor's employee against a vessel owner for injuries sustained in a fall while repairing the vessel's engine, the court explored the subject of actual-versus-potential liability. It stated that this issue "is unique to cases in which the original defendant (indemnitee) has settled with the original plaintiff without giving the third-party defendant (indemnitor) an opportunity to approve the amount of the settlement or to conduct the defense, and in which traditional indemnity principles are not modified by express contract between the parties." 484 F.2d at 304. The court distinguished those cases in which the indemnification claim was founded upon a judgment, a written contract, or the

indemnitor was tendered the defense and refused it. *Id.* In the "unique" cases in which the indemnitee has not tendered the defense or provided the indemnitor a meaningful opportunity to approve or disapprove the settlement, the court stated that the indemnitee has the burden of showing that its disposition of the indemnitor's money did not violate equitable indemnity principles. *Id.*

At a minimum, such equitable indemnity principles require the indemnitee to prove its potential liability to the plaintiff. *Id.* (citation omitted). In *Jennings v. United States*, 374 F.2d 983, 986 (4th Cir. 1967), the court held that "[t]he indemnitee's unilateral acts, albeit reasonable and undertaken in good faith, cannot bind the indemnitor; notice and an opportunity to defend are the indispensable due process satisfying elements." *Jennings* has been construed to mean that the opportunity to defend element may be satisfied by notice that an action against the indemnitee has been initiated. *Burke*, 619 F.2d at 358. But notice in this context must mean at least a meaningful opportunity to assume the defense. The *Parfait* court adopted the following solution to the indemnitee's burden of showing that the settlement did not violate equitable principles:

> A practical device by which an indemnitee can protect himself against the awkward possibility of having to prove the original plaintiff's case against himself, the original defendant, is to offer the indemnitor before any settlement is concluded the choice of (1) approving the settlement or (2) taking over the defense of the case and agreeing to hold the indemnitee harmless in any event for damages which may be assessed against him in excess of the amount of the proposed settlement.

484 F.2d at 304-05.

In *The Toledo*, 122 F.2d 255, 257 (2d Cir.), *cert. denied*, 314 U.S. 689 (1941), we adopted a view that "[a] claim for indemnity . . . requires that an actual liability be sustained by the indemnitee, and if he settles a claim without a determination of the rights in question, he bears the risk of proving an actual liability in the action over for indemnity." (Citations omitted). In that case we held that the charterer failed to establish a lack of due diligence on the part of the vessel owners, and thus "failed to establish a right to indemnity based on an actual liability on its part." *Id.* Accordingly, we ruled that the trial court correctly denied the charterer's claim for damages because it acted as a "volunteer" when it compensated the cargo owners, since it was not even potentially liable for the delay caused by the latent defect in the crankshaft web. *Id.* Progressing logically from the rule in *Toledo*, we hold today that an indemnitee can only recover from an indemnitor upon proof of the indemnitee's potential liability if (1) the settlement is reasonable, and if (2) the indemnitor has sufficient notice in which to object to the settlement terms. When the indemnitor objects and the indemnitee fails to tender the defense of the action, the indemnitee must prove actual liability.

The cases cited by Atlantic for the proposition that it was not required to prove its actual liability to American are factually inapposite. Thus, for example, in *Damanti*, a longshoreman employed by a stevedore was injured while moving a hatch cover beam with a beam jack supplied by the ship on the defendant Inger's vessel, time chartered to Illinois Atlantic Corp. The plaintiff longshoreman sued Inger alleging negligence and unseaworthiness. Inger brought in as third party defendants the

stevedore and Illinois Atlantic, with each cross claiming against the other. The case was tried before a jury. Before summations, defendant Inger settled with the longshoreman after first offering third party defendants an opportunity to assume the defense, which they declined. 314 F.2d at 396. Similarly, in *Burke*, the potential indemnitor was a third party defendant in the main action against whom the indemnity claim was made from the beginning of the litigation. Although the indemnitee did not invite the indemnitor to participate in the settlement negotiations, the indemnitor was kept advised that settlement negotiations were being conducted, and counsel for the indemnitor expressed no interest in participating. When informed of the proposed settlement, indemnitor's counsel voiced no objection. Further, when the terms of the settlement were placed on the record in open court, he remained silent. 619 F.2d at 358.

In sharp contrast, in the instant case the only notice Atlantic gave to Interstate of its settlement with American and of its indemnity claim was the already noted telephone call by Atlantic's counsel to Interstate's counsel on the night before the settlement. Atlantic's lawyer did not offer Interstate the choice of approving the settlement or assuming the defense. Moreover, Atlantic, prior to its settlement with American, gave no notice to Interstate that it was going to seek indemnity from Interstate for any liability or damage for which it might be held liable to American.

Thus, unlike *Damanti* and *Burke* where the indemnitors were advised from the beginning of the main action that an indemnity claim was being made and were informed of settlement negotiations, this case is more like *Whisenant* in several critical respects. There the indemni-

tor was not notified of the settlement negotiations until their conclusion; further, the indemnitee neither offered the proposed settlement to the indemnitor for approval nor tendered the defense of the claim. In addition, the record in *Whisenant* strongly suggested that the indemnitor, like Interstate in the present case, would have contested the original claim had there been an opportunity to do so. The district court in *Whisenant* entered judgment against the indemnitor solely on a finding that the settlement was reasonable. The case was later remanded for a determination of actual liability because the appellate court believed that the trial court's finding of a reasonable settlement was insufficient to support a judgment against the indemnitor, absent a tendering of the defense or an "opportunity to review, pass upon, or participate in the settlement itself." 446 F.2d at 403.

In sum, the rule that has evolved from the cases cited is that where a party seeking indemnity settles with a plaintiff without giving the potential indemnitor an opportunity to approve the settlement, then such party has the burden of proof to show that equitable indemnity principles have not been violated. Notice sufficient to give the indemnitor a meaningful opportunity to defend is the indispensable element to be proven by the party seeking indemnity. If the indemnitor declines either to approve the settlement or to take over the defense, the indemnitee is required to prove only its potential liability to the plaintiff. Where notice—which includes a meaningful opportunity to assume the defense—is lacking, a demonstration of actual liability is required.

Applying this rule to the instant case, Atlantic's failure to tender its defense to American's counterclaim to Interstate was not standing alone a serious omission that

violated equitable principles given the settlement agreement between Interstate and American, under which Interstate agreed to cooperate with American in the defense of any and all pending actions arising out of the explosion. Yet, we do not rest our decision on that point alone. That failure, coupled with only 24-hours notice of the settlement, *did* violate equitable principles. In that regard, we conclude that the district court's finding that Atlantic's overnight notice to Interstate was adequate is clearly erroneous because it did not afford Interstate a meaningful opportunity to assume the defense, if it so desired. *See Anderson v. City of Bessemer City, N.C.*, 105 S. Ct. 1504, 1511 (1985); Fed. R. Civ. P. 52(a). As a consequence, the district court erred in holding that Atlantic did not have to prove its actual liability to American.

III ACTUAL LIABILITY

Interstate next asserts that Atlantic was not even potentially liable to American and therefore that this Court need not remand to the district court for a finding on the question of actual liability. Interstate further argues that because Atlantic was not potentially liable to American the district court erred in holding that the amount of Atlantic's settlement was fair and reasonable.

Atlantic alleged two bases for its liability to American. First, Atlantic asserted that as time charterer of the barge OCEAN 80 it was responsible for the alleged negligence of Interstate's employees.[1] The district court correctly

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1 An affidavit filed in 1980 by the attorney who tried and settled the case for Atlantic against American stated:

rejected this argument on the rationale that "[a] time charterer assumes no liability flowing from the unseaworthiness of the vessel or the negligence of the crew unless it is shown that the parties to the charter intended otherwise." *Klishewich v. Mediterranean Agencies, Inc.* 302 F. Supp. 712, 713 (E.D.N.Y. 1969) (citations omitted). We accept the finding of the district court that "[t]he evidence adduced at trial does not overcome the presumption that the time charterer (Atlantic) assumed no liability for the negligence of the bareboat charterer (Interstate)."

The second claimed basis was that under paragraph seven of the lease between American and Atlantic, Atlantic essentially became a guarantor or insurer of American's property and of American's liability to third

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(Footnote continued from previous page)

> . . . the [American] counterclaims were not based solely on the indemnity provision contained in the Lease Agreement but, in addition, predicated alleged liability of [Atlantic] on failure to use due diligence to ascertain the seaworthiness of the barge OCEAN 80, the unseaworthiness of the barge OCEAN 80 and negligent acts or omissions of the crew of the barge OCEAN 80. In the course of the trial, [American] called as one of its principal witnesses the surveyor who had measured the capacity of the barge for Interstate. He testified that the capacity of the barge was substantially more than that found by the Coast Guard. Because the negligence which [Atlantic] had alleged against [American] was that [American's] employee had allowed the gasoline and fuel oil to flow beyond the known capacity of the barge, [Atlantic's] basis for its cause of action against [American] was ended. Any negligence of [American's] employees would not have been a proximate cause of the explosion and fire. Obviously, Interstate knew this, elected to keep this knowledge secret from its customer [Atlantic] and elected to reveal it to [American] to defeat [Atlantic's] claim. The only remaining possibility was that Interstate's negligence or that of its employees had caused the casualty.
>
> The true capacity of these tanks however, was established in a deposition held in the limitation proceeding on October 29, 1975, two years prior to the American-Atlantic trial at which deposition Atlantic's counsel participated.

parties, and that Interstate's negligence triggered the application of this provision. Paragraph seven states in relevant part:

> Lessor [American] shall in no event, be liable for loss of or damage to Lessee's [Atlantic] commodities or property except when caused by Lessor's failure to use reasonable care in the safekeeping and handling of Lessee's property. Lessee [Atlantic] *shall exonerate, indemnify and save harmless Lessor [American] from and against any liability for damage of the property of Lessee, Lessor or others*, liability for injury (including death) to persons (including employees of Lessor) and all claims or actions in connection with such damage, based upon, arising out of or occurring in connection with the deposit or withdrawal of Lessee's material, *except such claims as arise out of Lessor's failure to use reasonable care in the safekeeping and handling of the Lessee's commodities or property.* (Emphasis added).

The district court interpreted "exonerate, indemnify and save harmless Lessor [American] from and against any liability for damage of the property of Lessee, Lessor or others" to mean that Atlantic agreed to reimburse American for any damage to *its or others* property arising from circumstances such as those in the instant case. We disagree.

Read as a whole, paragraph seven creates liability on Atlantic's part only with regard to third party claims against American. Interstate's settlement of $1,000,000 with American reflected reimbursement for a significant amount of these third party payments. The district court record reveals that the settlement of all the third party

claims amounted to $949,180. Paragraph seven does not render Atlantic liable to American for damage to American's own property; the language plainly refers to indemnification for liability to third parties. The inartful inclusion of the word "lessor" does not alter the meaning to one which supports Atlantic's liability; it merely creates ambiguity in a document which must be construed against its drafter, American. *Navieros Oceanikos, Etc. v. S.T. Mobil Trader*, 554 F.2d 43, 48 (2d Cir. 1977) ("While this may not be the only possible interpretation . . . the drafter of the contract, is not entitled to its construction of the indemnity clause. Having drawn an ambiguous agreement, one capable of two reasonable and practical interpretations, the defendants must be held to the interpretation least in their favor."); *See American Ex. Is. Lin., Inc. S/S Exp. Amb. v. United States*, 390 F. Supp. 63, 66 and n.5 (S.D.N.Y. 1975).

We addressed a similar question of contract interpretation in *Schiavone Const. Co., Inc. v. County of Nassau*, 717 F.2d 747 (2d Cir. 1983). There, a construction company filed suit seeking to recover the cost of repair work on a sewage pipeline. The County sought indemnification from the engineering firm which had designed the project. The following indemnity clause was before us:

> The Engineers agree that in the performance of its services hereunder, they will comply with any and all applicable provisions of the Labor Law of the State of New York. Further, the Engineers agree that they will be responsible for and *save the County harmless from all claims, damages, costs and expenses arising from the use of any patented articles in connection with the work and also arising from the performance of the work of the Engineers including damages to*

> *persons or property and the defense, settlement or satisfaction of such claims.*

Id. at 750 (emphasis added).

In rejecting the claim that the provision covered loss to the alleged indemnitee's (County) own property, we stated:

> The indemnity clause provides first that Consoer "will be responsible for and save the County harmless from all claims, damages, costs, and expenses arising from the use of any patented articles in connection with the work . . . . " No legitimate argument could be made that "claims, damages, costs, and expenses," as there used, refers to anything other than direct liability to a third person. The words obviously do not refer to damage to the pipeline itself.
>
> The County's argument that, when the clause "and also arising from the performance of the work of the Engineers" is added to the foregoing language, the words "claims, damages, costs, and expenses" take on a different meaning and include damages to the County's own pipeline, seems to be refuted by the clause "including damages to persons or property *and the defense, settlement or satisfaction of such claims*." (Emphasis supplied). One does not defend, settle or satisfy damages to his own property.

Id. at 751. We also note in passing that indemnity agreements are generally designed only to protect against liability for damage to third parties. Every successful indemnity case cited by the County in *Schiavone* involved third party liability. *Id.*

Moreover, Atlantic would not be liable to American under paragraph seven of the lease inasmuch as the evidence of American's failure "to use reasonable care in the safekeeping and handling of the Lessee's commodities or property" is particularly strong. The district court itself recognized the significance of American's failure to exercise due care:

> *Negligence on American's part certainly did play a role in the actual severity of the damage.* There was no procedure in place for a supervisor of American to be informed on an ongoing basis as to the status of valves or as to the movement of product through the American facility; the fire-fighters in the facility were off duty and thus their response to the fire was slow; the American dockman was away from the fuel transfer area for a period of time prior to the explosion and did not know the rate at which the fuel was being loaded into the barge; there was no centrally located valve status list available to the personnel, and valves had to be turned manually to determine if they were open or closed. These matters were noted by the Coast Guard in its report, and I accept them as established at this trial. (emphasis added).

Further, the trial court noted, "there were only two tortfeasors in this incident: Interstate and American."

We are not inclined to give much weight to the district court statements in the earlier action between Atlantic and American that the settlement was "fair and reasonable . . . both as to liability and amount." Instead, it appears that Atlantic, faced with American's $5,000,000 damage claim, decided as a matter of trial strategy to

settle for $500,000. In its own self-interest Atlantic entered into this settlement with American perhaps thinking it incurred no risk because it could look to Interstate for indemnity. Yet, by failing to give notice to the indemnitor sufficient for it to have some say over whether its funds were being well-spent, Atlantic eliminated indemnity as a possibility and demonstrated the truth of the adage that one who quickly pays ahead of time takes the risk that he will not later be well-served.

Because the case was settled, the district court did not receive the benefit of the kind of adversarial presentation that would lend weight to its view; the kind, for example, that would have been provided had Interstate been impleaded and appeared as a third party defendant in the action. This inevitably contributed to the district court making a clearly erroneous finding regarding the reasonableness of the settlement. Moreover, holding Interstate to be an indemnitor under circumstances where it was entitled to—but did not receive—adequate notice, without hearing Interstate's arguments against such status contravenes firmly fixed due process concerns. *Cf. Windsor v. McVeigh*, 93 U.S. 274, 277 (1876). Thus, Judge Conner's finding that the settlement was fair and reasonable, adopted by Judge Broderick, was clearly erroneous.

IV CONCLUSION

Since Atlantic has not shown even potential liability, we need not remand the case. The question of whether the district court erred in not dismissing Atlantic's complaint on the ground that the release given to Interstate by American and the dismissal of American's claims precluded any action by Atlantic against Interstate is moot.

Central to the district court's findings that Interstate was liable in indemnity to Atlantic was its determination that Interstate breached its implied warranty of seaworthiness. Yet, since Atlantic failed to demonstrate even its potential liability to American, review is unnecessary on the question of whether Interstate breached its implied warranty of seaworthiness and the related questions of whether Interstate had the right to limit its liability and whether Interstate failed to meet its burden of proving that the statutory violations of its tankerman could not have caused the explosion and the resulting damage.

The judgment of the district court is reversed and Atlantic's complaint is dismissed.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 1054 (VLB)

ATLANTIC RICHFIELD CO.,

Plaintiff,

—against—

INTERSTATE OIL TRANSPORT CO.,

Defendant.

OPINION

VINCENT L. BRODERICK, *U.S.D.J.*

The case is before me after a bench trial. It is the last of a series of actions stemming from an explosion and a fire at the General American Transport Company ("American") facility in Carteret, New Jersey on October 25, 1972. This opinion contains my findings of fact and conclusions of law pursuant to Fed.R.Civ.P. §52(a)

I.

The tank barge OCEAN 80 was owned by the Ocean 80 Company and was bareboat chartered to defendant Interstate Oil Transport Co. ("Interstate"). Plaintiff Atlantic Richfield Co. ("Atlantic") orally time chartered the tank barge OCEAN 80 from Interstate to transport gasoline and fuel oil stored at American's facility. Under the oral agreement, the barge was to be tended by employees of Interstate, and when the barge was at American's loading facility, Interstate's employees were to work in cooperation with American's employees. Atlantic had no employees either on the barge or at the loading facility.

On October 25, 1972 the barge was moored at American's Carteret terminal and was being loaded with a cargo of

gasoline and fuel oil which had been stored in American's shore tanks. The cargo was owned by Atlantic and had been stored at the American terminal pursuant to a written contract between American and Atlantic entered into on or about August 10, 1971.

About 6:00 a.m. an explosion occurred. The explosion and the resulting fire caused destruction of the cargo. It also caused severe damage to the barge, to American's facility, and to the property of third parties.

This case is, as noted, only one of several litigations in this court with respect to the accident of October 25, 1972.[1] Ocean 80 Company and Interstate filed a petition for exoneration from or limitation of liability, and American and Atlantic filed claims in that proceeding; Ocean 80 Company and Interstate filed a complaint for damages against American; and Atlantic filed a complaint against American, seeking recovery for Atlantic's loss of cargo. American counterclaimed in that action. It sought to recover $5,000,000 for damages sustained as a result of the explosion, and it sought indemnification under the storage contract between Atlantic and American[2] for amounts that American might be compelled to pay to third persons.

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1. All litigation concerning the accident, other than this action, has been concluded. In none of the other judicial proceedings did the court reach a resolution on the merits. There were also administrative inquiries with respect to the October 25, 1972 accident. The Coast Guard held extensive hearings and issued a detailed report. There also was an inquiry by the National Transportation Safety Board.

2. Clause 7 of this August 10, 1971 agreement between American and Atlantic provided:

> Lessee [Atlantic] shall exonerate, indemnify and save harmless Lessor [American] from and against any liability for damage of the property of Lessee, Lessor or others, liability for injury (including death) to persons (including employees of Lessor) and all claims or actions in connection with such damage, based upon, arising out of or occurring in connection with the deposit or withdrawal of Lessee's material, except such claims as arise out of Lessor's failure to use reasonable care in the safekeeping and handling of the Lessee's commodities or property.

In December, 1976 Ocean 80 Company and Interstate settled with American.[3] The terms of that settlement were that Interstate would pay $1,000,000 to American and that each of those parties would waive claims against the other. The settlement recited that it was not to be construed as an admission of liability by either party. As part of the settlement agreement American agreed that if Atlantic recovered from Interstate or the Ocean 80 Company for Atlantic's loss of cargo, American would indemnify and hold Interstate harmless for the sums found to be due from Interstate or Ocean 80 Company to Atlantic. American also agreed that it would settle the claims of each of the other entities that had sustained damage, excepting from this agreement only Atlantic's claim in the limitation of liability proceeding for cargo loss. The settlement agreement between American on the one hand and Interstate and Ocean 80 Company on the other provided 1) that Atlantic's claim in the limitation proceeding and 2) Atlantic's claim against American for cargo loss and American's counterclaim against Atlantic for damages and indemnification were to continue in litigation.

On May 12, 1977 an order was entered in the limitation of liability proceeding. That order, which terminated the proceeding, provided that: 1) the claims and counterclaims set forth in the action of Atlantic against American would not be affected,

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3. The settlement agreement recited that American had already paid $900,000 in settlement of some third-party claims and that it might be obligated to pay $350,000 in settlement of others. Though it is unclear whether the entire additional $350,000 would be paid by American, the settlement agreement states that any amounts up to $125,000 in excess of this $350,000 would be paid by Interstate and Ocean 80 Company. Any additional amounts required to be paid in excess of $475,000 were to be paid by American. Assuming that American were required to pay the entire $350,000 amount, but that the total of additional settlement payments to third parties did not exceed $475,000, American would have been left, in sum, with a liability of $350,000. Although American may have at the time of settlement absorbed some of the loss, the settlement agreement permitted American to continue to pursue its claim against Atlantic for $5,000,000 in property damage.

and 2) the claim of Atlantic against OCEAN 80, Ocean 80 Company and Interstate in the limitation of liability proceeding would be discontinued a) without prejudice to the right of Atlantic, upon conclusion of its suit against American, to bring a further action against Ocean 80 Company and/or Interstate, in which action Atlantic could assert any claim it would have been entitled to assert immediately prior to the entry of the order of May 12, 1977, and b) without prejudice to the right of Interstate and Ocean 80 Company to assert the partial defense of limitation of liability.

In November, 1977 Atlantic's action against American came on for trial before the Honorable William C. Conner. After three days of trial, the matter was settled. In that settlement, Atlantic waived its claim for cargo loss and agreed to pay $500,000 to American, with respect to American's $5,000,000 counterclaim, as a "fair and reasonable settlement of [the] litigation both as to liability and amount." In addition, the order of settlement recited the following:

> [I]t appears that [Atlantic] may be unable to sustain its burden of proving a causal relationship between any lack of reasonable care on the part of [American] in the handling of [Atlantic's] products and the loss thereof and . . . the Coast Guard Marine Board of Investigation found contributory fault on the part of employees of [Interstate], operator of the Barge Ocean 80, and . . . it appears that plaintiff [Atlantic] may be responsible to defendant [American] for any negligence on the part of [Interstate], Ocean 80 Company or employees thereof, even without any other showing of negligence on the part of [Atlantic] . . .

Judgment Order of the Honorable William C. Conner, U.S.D.J., S.D.N.Y., December 2, 1977.

The settlement entered into between Atlantic and American was fair and reasonable. Atlantic, pursuant to Clause 7 of its contract with American, was to indemnify American for all losses "except such claims as arise out of lessor's failure to use reasonable care in the safe keeping and handling of lessee's

commodities or property." Atlantic would probably not have been able to satisfy its burden of proving a causal connection between any lack of reasonable care on American's part and Atlantic's loss. The settlement was for less than American's counterclaims: Interstate in its settlement with American agreed that these counterclaims would be permitted to be pursued, and even agreed to assist American in its litigation against Atlantic.

II.

Atlantic's burden in this case is to establish its potential, not its actual, liability to American. It has met this burden. I premise that finding upon my analysis of the facts, and upon my determination that the notice plaintiff gave to defendant of its settlement with American was adequate. *See, e.g., Burke* v. *Ripp*, 619 F.2d 354, 359-60 (5th Cir. 1980). As Judge Goldberg stated in concurrence, "a settling indemnitee can recover from an indemnitor upon proof of the indemnitee's potential liability if the settlement terms are reasonable and if the indemnitor has notice of the suit, has notice of the settlement terms, and has failed to object to those terms even though he has had a reasonable opportunity to approve or disapprove the settlement." *Id.* at 360.

While cases cited by the defendant in its various memoranda do hold that in the absence of a full tender of the defense the plaintiff must prove the actual liability of the defendant, they are factually inapposite, especially in light of the complicated procedural history of this case. *See, e.g., Caribbean Steamship Co., S.A.* v. *Sonmez Denizcilik Ve Ticaret A.S.*, 598 F.2d 1264, 1267 (2d Cir. 1979); *Whisenant* v. *Brewster-Bartle Offshore Co.*, 446 F.2d 394, 401-02 (5th Cir. 1971), *reh'g and reh'g en banc denied* (Sept. 29, 1971); *Tankrederiet Gefion A/S* v. *Hyman-Michaels Co.*, 406 F.2d 1039, 1043 (6th Cir. 1969); *New York Sandy Hook Pilots Ass'n* v. *Rodermond Industries, Inc.*, 394 F.2d 65 (3d Cir. 1968).

Interstate and American entered into an agreement whereby Interstate agreed to give full and complete cooperation in the defense of any and all pending actions, in particular noting the

Atlantic v. *American* action. Interstate was therefore on notice that there was continuing litigation. Further, there were only two tortfeasors in this incident: Interstate and American. No one from Atlantic was present in Carteret on the night at issue, and therefore the only foundation for American's claim against Atlantic was negligence by Interstate, with clause 7 of the lease agreement providing the vehicle for bringing such a claim. Interstate was therefore aware not only that the litigation between Atlantic and American was continuing but also that its negligence could possibly be the basis for a judgment against Atlantic and in favor of American. Atlantic's attorney did not tender the defense to Interstate. He did, however, telephone Interstate's attorney the night before the settlement and inform him that the settlement was going to take place. However, Interstate's attorney neither approved nor disapproved the settlement.

Further, Judge Conner found the settlement fair and reasonable both as to liability and amount, and that the evidence indicated that Atlantic would not have been able to sustain its burden of showing a lack of due care on American's part. Lastly, Atlantic and American settled for significantly less than American sought, that is $500,000 while seeking $5,000,000.

The foregoing represents what I believe to be sufficient notice and opportunity to defendant to allow plaintiff to recover from defendant on the basis of potential and not actual liability. While the duration of the settlement negotiations between Atlantic and American is not known, three days of a trial took place and the settlement was most likely reached the night of the third day of trial. Interstate received a phone call the same night. Why Interstate's attorney neither approved nor disapproved of the settlement was not presented to me, and in the absence of such testimoney or evidence, Interstate may not ask me to infer that it disapproved or would have disapproved of the settlement. Indeed, by its silence I am tempted to draw an inference adverse to its position, but find that such an inference is not necessary, in light of the foregoing recitation of the facts which demonstrates that Atlantic has met its burden of only needing to prove potential liability. *See, e.g.*, *Parfait* v.

Jahncke Service Inc., 484 F.2d 296, 304-06 (5th Cir. 1973), *reh'g denied* (October 3, and October 24, 1973), *cert. denied*, 415 U.S. 957 (1974); *Damanti* v. *A/S Inger*, 314 F.2d 395, 397 (2d Cir.), *cert. denied*, 375 U.S. 834 (1963).

Furthermore, the tendering of the defense to Interstate, a party bound by a stipulation to assist American in the defense of actions in the limitation of liability proceeding, or any other proceedings arising out of the OCEAN 80 explosion, would have been a useless and futile act, and one that will not be required by this court.

III.

In this action Atlantic seeks to recover from Interstate the $500,000 that Atlantic paid in settlement to American. I denied defendant Interstate's first motion for summary judgment because the existing state of the record did not indicate whether the parties intended to alter the traditional admiralty rule that a time charterer cannot be held liable to third parties, absent an indication that the parties to the agreement intended otherwise.

Defendant Interstate moved once again for summary judgment. I then ruled that the evidence submitted by both parties on the issue of intent, i.e., the deposition testimony of Bruce H. Hooper, vice-president of Interstate, and of Herbert J. Russell, claims manager of Atlantic's insurance division, required the court to draw an inference that may be consonant with traditional principles of admiralty law but is inadequate as a basis for summary judgment.

On the second motion, defendant Interstate also maintained that as of the time of the settlement of plaintiff's cargo action against American, resulting in plaintiff's payment to American of $500,000 on American's counterclaims, any duty that defendant Interstate might once have owed to American had long since been extinguished by the December, 1976 settlement between American and defendant. Defendant argued that because plaintiff's asserted right to recover against defendant derived from a potential right of American to recover against

defendant, the December, 1976 American-Interstate settlement warranted dismissal of Atlantic's claim here as a matter of law; that the December, 1976 settlement, and the exchange of mutual releases between American and Interstate, extinguished Atlantic's rights, as contractual indemnitor of American, to recover against Interstate.

An insurer, to the extent that it has paid on a loss, is generally subrogated *pro tanto* to the rights of its insured against a third party whose negligence or wrongful act occasioned the loss. [4] However, the insurer acquires no right of subrogation until it pays the loss. When a third-party tortfeasor is effectively released from liability by a settlement between the insured and the tortfeasor which was entered into before an insurer's payment of the loss, the settlement and release bar the insurer's right of recovery from the tortfeasor, in the absence of fraud against the insurer or collusion between the insured and the tortfeasor.

When, however, the instrument of release running from the insured to the tortfeasor provides that the settlement is not intended to discharge the insurer with respect to the full extent of any claim that the insured might have against it, and the instrument of release is given after receipt of payment from the tortfeasor covering only part of the loss, the insurer's right to be subrogated to the claims of the insured against the tortfeasor is not barred to the extent that the amount paid did not cover the full amount of the loss. This is particularly true when the settlement between the insured and the tortfeasor contemplates that the insured will thereafter pursue its claims with respect to the loss against the insurer. *See Connecticut Fire Insurance Co.* v. *Erie Railroad*, 73 N.Y. 399 (1878).

In *Connecticut Fire Insurance*, an insured's property was destroyed in a fire resulting from the negligence of a railroad, and the insurer paid on the loss after the insured had released the railroad from all liability. The insurer then sued the

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4. An insurer's equitable right of subrogation requires payment of a debt for which another is primarily responsible. *See generally*, 73 Am. Jur.2d, *Subrogation* § 26 (1974).

railroad. The railroad, like the defendant in this case, challenged the insurer's claim, maintaining that the settlement, and the release from the insured running to the railroad tortfeasor, extinguished the insurer's claim against the tortfeasor. The court concluded that where the insured received less than the value of the destroyed property from the tortfeasor, the release by the insured of the tortfeasor without releasing the insurer from further liability, by its terms operated to prevent the insurer from interposing the release as a defense to the insured's action on the policy. So far as the insurer was concerned, it was as if no release had been given; to the extent, therefore, that the insurer remained liable for the loss under the policy, its right of subrogation remained intact.

Under paragraph 7 of the lease agreement between plaintiff and American[5] plaintiff essentially undertook an insurer's liability to American: plaintiff agreed to "exonerate, indemnify and save harmless" American against any damage to its or others' property arising from circumstances such as those alleged in this case.[6] *See* N.Y. Ins. Law §§4(22), 41(1).[7] The

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5. *See supra* note 2.

6. I find the language of the American-Atlantic lease agreement itself persuasive evidence that the property of American as well as that of Atlantic and of third parties was covered under the indemnity agreement. The plaintiff agreed to "exonerate, indemnify and save harmless . . . from damage of the property of lessee, *lessor* or others" (emphasis added). Further, in its 1976 settlement with American, defendant specifically noted that American had settled with third parties and that the $1,000,000 paid by Interstate to American as part of the settlement reflected reimbursement for a significant amount of those payments. Defendant cannot now maintain that American was not justified in making those payments, when defendant itself approved such action in the settlement.

7. The term "insurance contract" as it pertains to the business of insurance is defined in the New York Insurance Law as "any agreement or other transaction whereby one party, herein called the insurer, is obligated to confer benefit of pecuniary value upon another party, herein called the insured or the beneficiary, dependent upon the happening of a fortuitous event in which the insured or beneficiary has, or is expected to have at the time of such happening, a material interest which will be adversely affected by the happening of such event." N.Y. Ins. Law, § 41(1) (McKinney 1966).

settlement payment made by plaintiff to American, pursuant to Judge Conner's judgment order dated December 2, 1977, was obviously a payment pursuant to paragraph 7.

The situation in this case is analogous to that in *Connecticut Fire Insurance*. In the settlement between American (the insured) and Interstate (the tortfeasor) in 1976, it was specifically noted that the claims asserted in the *Atlantic* v. *American* case were to "continue in litigation." This meant, therefore, that American (the insured) and Interstate (the tortfeasor) both contemplated that neither Atlantic's claim for cargo loss nor American's claim for property loss were being settled. Since Atlantic was clearly blameless with respect to the incident on October 25, 1972 which caused the damage, the insured and the tortfeasor obviously contemplated, in their settlement, that American would pursue its rights *qua* insured against Atlantic, pursuant to clause 7 of the written contract between Atlantic (the insurer) and American dated August 10, 1971; and that the settlement between American and Interstate was for less than the full amount of the loss suffered by American at the hands of the tortfeasor Interstate. American (the insured) and Interstate (the tortfeasor) purported to absolve each other from liability while American (the insured) continued to press the liability of Atlantic (the insurer) to its insured.[8] As to Atlantic, it was as if there had never been a settlement between American and Interstate, and Atlantic could not interpose the release as a defense in the Atlantic/American dispute.

In the second summary judgment motion I found that Atlantic's rights had not been extinguished by any of the prior proceedings. No new evidence has been presented that persuades me otherwise. Considering the factual background to this action, as well as the relationships between the parties, Atlantic's rights of recovery as against Interstate were not

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8. In its settlement with American, Interstate agreed to cooperate with American with respect to the litigation between Atlantic and American. *See* Agreement of Settlement between Interstate and American, dated December 23, 1976.

extinguished by the 1976 settlement between all concerned parties *but* Atlantic.

IV.

Atlantic seeks recovery against Interstate on two theories which can be summarized as follows: 1) that it was the intention of Atlantic as time charterer and Interstate as bare-boat charterer that Interstate would reimburse Atlantic for sums expended by Atlantic to third parties on account of Interstate's negligence; 2) that Interstate committed a breach of an implied condition that it would provide a seaworthy vessel. Both theories upon which recovery is sought are generally grounded in indemnity (although the predicate for the second ground is breach of personal contract). Atlantic had the right to assert these claims in indemnity "immediately prior to the entry of [the] order" in the *Atlantic* v. *American* litigation. "While the right to indemnity should be asserted at the outset, it does not maturate until [there is a] judgment against the indemnitee." *American Oil Company* v. *M/T Lacon*, 398 F.Supp. 1181, 1194 (S.D. Ga. 1973), *aff'd w/o opinion*, 518 F.2d 1405 (1974). *See Greenwich Marine, Inc.* v. *S.S. Alexandra*, 339 F.2d 901, 905 (2d Cir. 1965). The right to seek indemnification existed on May 12, 1977 when, as part of the termination of the limitation of liability proceeding, the right was reserved to Atlantic to assert against Interstate any claim it would have been able to assert immediately prior to the entry of the order terminating the limitation of liability proceeding (see p. 4, *supra*). That Atlantic had not earlier asserted its claim in indemnity is not a bar to Atlantic bringing that claim now.

Plaintiff's payment to American in the settlement of the Atlantic-American litigation did not automatically create a liability running from Interstate to Atlantic with respect to the amount of such payment. It is a traditional admiralty principle that a time charterer is not responsible for the negligent acts of the bare boat charterer. Under this indemnity theory, in order to hold Interstate liable, and not deem Atlantic's payment to

American one made by a mere volunteer, the parties must have intended to alter this traditional admiralty principle. "A time charterer assumes no liability flowing from the unseaworthiness of the vessel or the negligence of the crew unless it is shown that the parties to the charter intended otherwise." *Klishewich* v. *Mediterranean Agencies Inc.*, 302 F.Supp. 712, 713 (E.D.N.Y. 1969). *See Drago* v. *A/S Inger*, 194 F.Supp. 398 (E.D.N.Y. 1961).

As noted *supra*, I denied the defendant's second motion for summary judgment, stating that the intent of the parties had not been established adequately through depositions to permit me to determine whether the parties intended to alter this traditional admiralty principle. The evidence adduced at trial does not overcome the presumption that the time charterer (Atlantic) assumed no liability for the negligence of the bareboat charterer (Interstate).

Plaintiff's second claim for recovery stands on more substantial ground.

Plaintiff contends that irrespective of the existence or nonexistence of an articulated indemnity relationship between itself and the defendant, defendant owed to plaintiff the duty of providing a seaworthy vessel. Asserting liability under several different theories, the plaintiff contends that the breach of this duty of seaworthiness would render Interstate liable, without any limitation of liability. A bareboat charterer steps into the shoes of the owner and assumes the same responsibilities as an owner.

The OCEAN 80 itself was apparently sound. The barge had been the subject of numerous Coast Guard inspections, the last one shortly before the explosion. There were many conditions in and around the barge, however, that, certainly in the aggregate, rendered the barge unseaworthy. There were electrical appliances on board for which there was questionable approval for marine use; the barge was not gas free; the crew initially failed to operate a red warning light as required; a pipe was found frozen open; and the Interstate employee on duty was away from the barge for a significant period of time, not

monitoring the flow of product from the American facility into the barge. Several repairs and alterations to the OCEAN 80 in the weeks immediately preceding the explosion and fire on October 25, 1972 may have contributed to the incident. A defective "O" ring seal on the port well cargo pump of the OCEAN 80 had been leaking; it was replaced without testing the seal by pressurizing the pump. A 12-volt lighting system had been installed within the log shack on the deck of the OCEAN 80, but had not been inspected by the Coast Guard at any time prior to the explosion.

Negligence on American's part certainly did play a role in the actual severity of the damage. There was no procedure in place for a supervisor of American to be informed on an ongoing basis as to the status of valves or as to the movement of product through the American facility; the fire-fighters in the facility were off duty and thus their response to the fire was slow; the American dockman was away from the fuel transfer area for a period of time prior to the explosion and did not know the rate at which the fuel was being loaded into the barge; there was no centrally located valve status list available to the personnel, and valves had to be turned manually to determine if they were open or closed. These matters were noted by the Coast Guard in its report, and I accept them as established at this trial.

The most crucial of Interstate's malfeasances, however, is that Alton Joyner, defendant's employee and tankerman, was not present on the barge, supervising the cargo-loading operation. It was the failure of Joyner to be present on the barge which was the proximate cause of the explosion. The presence of Joyner was required by regulation. Joyner's absence prevented the prompt discovery of the problem, and thus no appropriate immediate actions to rectify the situation—for example, stopping the flow of fuel—were taken.[9] The failure to

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9. The Commandant's Action on the Coast Guard Inquiry found that in a material respect actions by the defendant in this case resulted in the fire and explosion. The commandant specifically rejected a finding that American should be found responsible in any part for the oil spill, because "[t]he

have a licensed officer or certified tankerman on duty to perform transfer operations constitutes a violation of Interstate's statutory duty. *Commercial Transport Corp.* v. *Martin Oil Service*, 374 F.2d 813, 819 (7th Cir. 1967). The regulations require that the senior deck officer on duty control operations when a ship (or barge) is being loaded or unloaded:

a) Supervise the operations of cargo system valves.

b) Start transfer of cargo slowly.

c) Observe cargo connections for leakage.

d) Observe operating pressure on cargo system.

e) *Observe rate of loading for purpose of avoiding overflow of tanks*

46 C.F.R. § 35 35(a)-(e) (emphasis added).

"[T]hese violations cast on [Interstate] the burden of showing that its violations could not have contributed to cause this fire." *Commerical Transport Corp.* v. *Martin Oil Service, Inc.*, 374 F.2d at 819; *The Pennsylvania*, 86 U.S. (19 Wall.) 125 (1873); *In re Seaboard Shipping Corporation*, 449 F.2d 132, 136 (2d Cir. 1971) (rule of *Pennsylvania* applies to noncollision cases), *cert. denied*, 406 U.S. 949, *reh'g denied*, 408 U.S. 932 (1972); *Tug Ocean Prince Inc.* v. *United States*, 584 F.2d 1151, 1160 (2d Cir. 1978), *cert. denied*, 440 U.S. 959 (1979). *See also Afran Transport Co.* v. *United States*, 435 F.2d 213, 218 (2d Cir. 1970), *reh'g denied* (Jan. 18, 1971), *cert. denied*, 404 U.S. 872 (1971); *Moran Scow Corp. & Tug M. Moran, Inc.* v. *S.S. Boston*, 342 F.Supp. 216, 234 (S.D.N.Y. 1972). Interstate did not meet its burden of proving that the absence of Joyner was not the cause of the explosion.

An explosion due to the start-up of the diesel engine was not the cause of the explosion. The diesel engine was not started: if it had been, there would have been severe injury or death to

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Commander, Third Coast Guard District has made a determination in this case that the operator of the tank barge OCEAN 80 would be the only party held responsible in this discharge of oil onto the navigable waters." *Plaintiff's Exhibit C at 8, Commandant's Action on Recommendation #4.*

the person who started it. If, however, one of the numerous other hypothetical causes of the explosion occurred, Joyner's presence on the barge, monitoring the tank fill-ups, could have prevented the accident.

V.

The parties in this case were operating under an oral arrangement. Such an arrangement constitutes the personal contract of the owner and subjects him to liability without any protection from statutes allowing for limitation of liability. *See Cullen Fuel Co.* v. *Hedger Co.*, 290 U.S. 82, 87 (1933). *See also Petition of Reliance Marine Transp. & Construction Corp.*, 206 F.2d 240, 243 (2d Cir. 1953); *Interstate Steel Corporation* v. *S.S. "Crystal Gem"*, 317 F.Supp. at 121. Included within this personal contract is the personal warranty of seaworthiness, at the time the vessel was delivered for its intended voyage.

Even if the personal contract doctrine did not apply, Interstate would still be liable because it was in privity with several of the circumstances that most likely gave rise to the explosion and subsequent fire. In order to escape liability under this theory, Interstate must "show either just how the loss did occur, or, if [it] cannot, [Interstate] must exhaust all the possibilities, and show that as to each [it] was without privity. [Once [it] has proven unseaworthiness Atlantic] . . . has no burden of proof. All [it] need do is to break down the case made by the petitioner and [it] wins." *The S.S. Hewitt*, 284 F. 911, 912 (S.D.N.Y. 1922). The defendant knew that the tankermen did not stay on the barge for the entire transfer time, and the company permitted them to leave for short periods of time. The company knew that electrical appliances that were found to be of questionable safety were on the OCEAN 80. As noted, *supra*, the absence of Alton Joyner, the Interstate tankerman, was, I find, the proximate cause of the subsequent explosion and fire. Under the circumstances, Interstate was in privity with these violations by its tankerman, and thus will be held responsible without any limitation of liability.

See also Terracciano v. *McAlinden Construction Co.*, 485 F.2d 304, 307-08 (2d Cir. 1973).

VI.

Due to defendant's breach of the personal warranty of seaworthiness, plaintiff was required to pay out $500,000 to American. Plaintiff is therefore entitled to recover the sums it expended.

VII.

Plaintiff shall submit judgment on two days' notice, with interest from December 2, 1977.

/s/ VINCENT L. BRODERICK
Vincent L. Broderick, *U.S.D.J.*

Dated: New York, New York
April 11, 1985

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 1054 (VLB)

ATLANTIC RICHFIELD CO.,

Plaintiff,

—against—

INTERSTATE OIL TRANSPORT CO.,

Defendant.

ORDER

VINCENT L. BRODERICK, *U.S.D.J.*

This order is made pursuant to Fed.R.Civ.P. 60(a) to correct an omission from my opinion of April 11, 1985. The following paragraph shall be added to footnote 9 of that opinion:

"I neither adopt nor reject the Coast Guard's finding that an overflow of the tanks of the barge OCEAN 80 took place. I note the disputes in the record with respect to the capacity of the tanks, but find that it is not necessary to reach the question of whether the tanks actually overflowed."

SO ORDERED.

/s/ VINCENT L. BRODERICK

Vincent L. Broderick, *U.S.D.J.*

Dated: New York, New York
July 1, 1985

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of February, one thousand nine hundred and eighty-six.

Present: HON. THOMAS J. MESKILL,
HON. RICHARD J. CARDAMONE,
HON. RALPH K. WINTER,

Docket No. 85-7550

ATLANTIC RICHFIELD CO.,

Plaintiff-Appellee,

INTERSTATE OIL TRANSPORT CO.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court with costs to be taxed against the appellee.

ELAINE B. GOLDSMITH,
Clerk

/s/ EDWARD J. GUARDARO
Edward J. Guardaro
Deputy Clerk

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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73 Civ. 1832 (SJR)

In the Matter of the Complaint of

OCEAN 80 CO., as Owner, and INTERSTATE OIL TRANSPORT COMPANY, as Chartered Owner of Barge OCEAN 80 for Exoneration from or Limitation of Liability.

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74 Civ. 4089 (SJR)

ATLANTIC RICHFIELD CORPORATION,

Plaintiff,

—against—

GENERAL AMERICAN TRANSPORTATION CORPORATION,

Defendant.

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75 Civ. 5186 (WK)

ALTON JOYNER,

Plaintiff,

—against—

GENERAL AMERICAN TRANSPORATION CORPORATION,

Defendant.

AGREEMENT OF SETTLEMENT

TO ALL WHOM THESE PRESENTS SHALL OR MAY CONCERN,

KNOW YE, That OCEAN 80 CO., as owner, and INTERSTATE OIL TRANSPORT COMPANY, as chartered owner, of

the barge OCEAN 80, corporations incorporated under the laws of the Commonwealth of Pennsylvania and the State of Delaware, respectively, and GENERAL AMERICAN TRANSPORATION CORPORATION, a corporation incorporated under the laws of the State of New York, and AETNA INSURANCE COMPANY, a corporation incorporated under the laws of the State of Connecticut have entered into a settlement of the above captioned actions on the following terms and conditions:

1. Ocean 80 Co., as owner, and Interstate Oil Transport Company, as charterer, of the barge OCEAN 80 and their underwriters waive any claims or causes of action which they have or may have had against General American Transportation Corporation to effect a recovery for the loss of the barge OCEAN 80 which occurred as a result of an explosion while said barge was moored to the General American Transportation Corporation terminal at Cartaret, New Jersey on or about October 25, 1972. Ocean 80 Co. and Interstate Oil Transport Company will enter into a stipulation of discontinuance of their counterclaim against General American Transportation Corporation filed in action #73 Civ. 1832, in the United States District Court, Southern District of New York, with prejudice but without costs.

2. General American Transportation Corporation and Aetna Insurance Company waive any claims or causes of action which they have or may have had against Ocean 80 Co. and/or Interstate Oil Transport Company for damages sustained to General American Transportation Corporation's facilities at Cartaret, New Jersey arising or resulting from the fire and/or explosion which occurred on board the barge OCEAN 80 on or about October 25, 1972. General American Transportation Corporation agrees to enter into a stipulation of discontinuance of the claim which it filed against Ocean 80 Co. and Interstate Oil Transport Company in action #73 Civ. 1832, in the United States District Court for the Southern District of New York, with prejudice and without costs.

3. Ocean 80 Co. and Interstate Oil Transport Company will pay the sum of One Million Dollars ($1,000,000.) to General American Transportation Corporation for its property damage.

4. As a result of or subsequent to the fire and explosion on October 25, 1972 various actions were commenced against Interstate Oil Transport Company and/or Ocean 80 Co. and/or the barge OCEAN 80 and/or General American Transportation Corporation, or all of them together by the following claimants:

(a) American Oil Company

(b) Witco Chemical Corporation

(c) Consolidated Edison Co. of New York Inc.

(d) Alton B. Joyner

(e) Western Union Telegraph Company, and

(f) the claims of all other parties who have filed claims in proceeding #73 Civ. 1832, United States District Court, Southern District of New York, against Ocean 80 Co. and Interstate Oil Transport Company or against General American Transportation Corporation

(g) Atlantic Richfield Corporation

It is understood that the claims or actions of (a) American Oil Company, (b) Witco Chemical Corporation and (c) Consolidated Edison Co. of New York Inc., have been settled and paid by General American Transportation Corporaiton for the aggregate amount of Nine Hundred Thousand Dollars ($900,000.00).

With regard to the claims designated (d), (e) and (f) if they cannot be settled or satisfied for an aggregate amount of Three Hundred Fifty Thousand Dollars ($350,000.00) or less, Ocean 80 Co. and Interstate Oil Transport Company shall then together contribute an additional amount up to but not exceeding One Hundred Twenty-Five Thousand Dollars ($125,000.00) as necessary in settlement or satisfaction of the aforesaid

claims. In the event that the claims indentified in subsections (d)—(f) are not settled by the aforesaid contribution of Four Hundred Seventy-Five Thousand Dollars ($475,000.00) General American Transportation Corporation shall contribute such additional amounts as may be necessary to effect settlement or satisfaction and General American Transportation Corporation hereby agrees to indemnify, hold harmless and defend Ocean 80 Co., Interstate Oil Transport Company and the barge OCEAN 80 from any liability or expense incidental to such settlement or satisfaction.

5. The claim of Atlantic Richfield Corporation to recover for the loss of the cargo laden aboard the barge OCEAN 80 which has been brought against Ocean 80 Co. and Interstate Oil Transport Company, in action #73 Civ. 1832, United States District Court, Southern District of New York, and the action brought by Atlantic Richfield Corporation against General American Transportation Corporation in action #74 Civ. 4089, United States District Court, Southern District of New York, and the counterclaim of General American Transportation Corporation against Atlantic Richfield Corporation are to continue in litigaiton.

In the event Atlantic Richfield Corporation effects a recovery for its loss from Ocean 80 Co. and/or Interstate Oil Transport Company, General American Transportation Corporation agrees to indemnify and hold harmless Ocean 80 Co., the barge OCEAN 80 and Interstate Oil Transport Company for whatever sum or sums may be due and owing Atlantic Richfield Corporation for the loss of its said cargo by way of settlement or judgment with or against Ocean 80 Co., Interstate Oil Transport Company, and/or the barge OCEAN 80.

6. In further consideration of the foregoing, Ocean 80 Co., Interstate Oil Transport Company, as owners and charterers of the barge OCEAN 80, and their attorneys, Clark, Ladner, Fortenbaugh & Young and Bigham, Englar, Jones & Houston agree to give full and complete cooperation in the petition for exoneration from or limitation of liability of the barge

OCEAN 80 and the defenses of any and all pending actions arising from the fire and explosion on October 25, 1972 as if petitioning or defending for their own account. It is understood that any costs incurred, including the reasonable value of any time expended, in rendering said full and complete cooperation shall be for the account of General American Transportation Corporation.

The execution of the Agreement of Settlement is not to be construed as an admission of liability on the part of any of the parties hereto.

BIGHAM, ENGLAR, JONES & HOUSTON
and
CLARK, LADNER, FORTENBAUCH & YOUNG
Counsel for Ocean 80 Co. and
Interstate Oil Transport Company

By/s/Donald M. Waesche, Jr.

VINCENT, BERG, RUSSO, MARCIGLIANO & ZAWACKI
Counsel for General American Transportation Corporation and Aetna Insurance Company

By/s/Carmen Anthony Russo

DATED:
New York, N.Y.
December 23, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 4089

ATLANTIC RICHFIELD CORPORATION,

Plaintiff,

—vs—

GENERAL AMERICAN TRANSPORTATION CORP.,

Defendant.

Before:

HON. WILLIAM C. CONNER,

District Judge

New York, New York—December 1, 1977

APPEARANCES:

HAIGHT, GARDNER, POOR & HAVENS, ESQS.,
Attorneys for Plaintiff
BY: GORDON W. PAULSEN, ESQ.,
THOMAS F. MOLANPHY, ESQ.,
ROBERT E. ANDERSON, ESQ., *of Counsel*

VINCENT, BERG, RUSSO, MARCIGLIANO
& ZAWACKI, ESQS.,
Attorneys for Defendant
BY: STANLEY W. ZAWACKI, ESQ.,
CARMEN ANTHONY RUSSO, ESQ., *of Counsel*

JUDGMENT ORDER

THE COURT: Whereas, this action came on to be heard before the Court on November 28, 1977, and the Court having read the pretrial order dated August 25, 1977 and the findings

of fact and conclusions reached by the United States Coast Guard Marine Board of Investigation dated October 5, 1973 (Plaintiff's Exhibit 10 herein), and having received in evidence various depositions and portions of the transcript of the testimony and said Coast Guard proceeding, and having heard the testimony of witnesses for the plaintiff and the defendant, and;

Whereas, the Court finds that Paragraph 8 of the lease agreement dated August 10, 1971 between ARCO and GATX provides, in effect, that if ARCO's loss is insured, the insurer has no right of subrogation against GATX, ARCO's claim, insofar as it seeks damages for losses which have been indemnified by insurance, is hereby dismissed, and;

Whereas, it appears that ARCO may be unable to sustain its burden of proving a causal relationship between any lack of reasonable care on the part of GATX in the handling of ARCO's products and the loss thereof, and;

Whereas, the Coast Guard Marine Board of Investigation found contributory fault on the part of employees of Interstate Oil Transport Company, operator of the Barge Ocean 80, and since it appears that plaintiff ARCO may be responsible to defendant GATX for any negligence on the part of Interstate Oil Transport Company, Ocean 80 Company or employees thereof, even without any other showing of negligence on the part of ARCO, and;

Whereas; GATX has agreed to accept the lump sum of $500,000 payable on or before December 31, 1977 in full settlement of its counterclaim, and ARCO has agreed to the discontinuance of its claim against defendant for loss of its products and ARCO has agreed to pay said sum of $500,000 on or before December 31, 1977, and the Court finding that this is a fair and reasonable settlement of this litigation both as to liability and amount, it is hereby ordered, adjudged and decreed that ARCO's complaint against GATX be and the same hereby is dismissed with prejudice and without costs, and it is further ordered, adjudged and decreed that GATX shall

have judgment on its counterclaim against ARCO in the sum of $500,000 without interest and without costs.

I understand that the terms of this settlement are agreeable to ARCO subject to the approval of one officer of ARCO which is expected momentarily.

MR. PAULSEN: Yes, sir.

THE COURT: And I understand that the settlement is also agreeable to GATX?

MR. RUSSO: Yes, your Honor, if we can interpret ARCO to mean ARCO and its underwriters.

THE COURT: Yes.

MR. PAULSEN: Yes.

THE COURT: Yes, obviously any interest represented by ARCO in this litigation.

MR. PAULSEN: And I suppose the same would be true of GATX and its underwriters?

THE COURT: And I further understand that you have spoken to the Insurance Company of North America and advised them that you plan to make this settlement and they have not indicated any disapproval of it.

MR. PAULSEN: That is correct.

/s/ WILLIAM C. CONNER

Hon. William C. Conner
United States District Judge

SO ORDERED.
12/2/77

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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73 Civ. 1832 (SJR)

In the Matter of the Complaint of

OCEAN 80 CO., as Owner, and Interstate Oil Transport Company, as Chartered Owner of Barge Ocean 80, for Exoneration from or Limitation of Liability

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72 Civ. 4615 (SJR)

AMERICAN OIL COMPANY,

Plaintiff,

—against—

OCEAN 80 COMPANY, INTERSTATE OIL TRANSPORT COMPANY and GENERAL AMERICAN TRANSPORTATION COMPANY,

Defendants.

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75 Civ. 5186 (SJR)

ALTON JOYNER,

Plaintiff,

—against—

GENERAL AMERICAN TRANSPORTATION CORPORATION,

Defendant.

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74 Civ. 4089 (SJR)

ATLANTIC RICHFIELD CORPORATION,

Plaintiff,

—against—

GENERAL AMERICAN TRANSPORTATION CORPORATION,

Defendant.

FINAL DECREE

A complaint herein having been filed on or about April 18, 1973 by Ocean 80 Co., as Owner, and Interstate Oil Transport Company as Chartered Owner, of Barge OCEAN 80 pursuant to Sections 4283-4285 of the Revised Statutes (46 USC §§ 183-185 and 188) and Rule F of the Supplementary Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure, for exoneration from or limitation of liability for all loss, destruction, damage or injury caused by or resulting from fire and explosion on the morning of October 25, 1972 and for certain other relief; and this Court having on or about April 25, 1973 entered an order directing Notice of Issue and Enjoining Suits and Directing the Filing of Claims on or before June 7, 1973 or be defaulted; and claims in said limitation proceeding having been filed and all except that of Atlantic Richfield Corporation ("ARCO") having been settled, compromised and disposed of; and the claims of American Oil Company against GATX (72 Civ. 4615) and Alton Joyner against GATX (75 Civ. 5186) likewise having been settled, compromised and disposed of,

NOW, upon motion of Bigham, Englar, Jones and Houston and Clark, Ladner, Fortenbaugh and Young, attorneys for plaintiffs in 73 Civ. 1832 and upon the subjoined consents, it is

ORDERED, ADJUDGED and DECREED, that the actions numbered 72 Civ. 4615 and 75 Civ. 5186 be and they hereby are dismissed with prejudice and without costs; and it is further

ORDERED, ADJUDGED and DECREED, that the defaults of all persons and corporations who may have sustained any loss, destruction, damage or injury caused by or resulting from said fire and explosion and who have not filed claims in 73 Civ. 1832 be and they hereby are noted and entered; and that the defaults of all such persons who have failed to file answers in 73 Civ. 1832 be, and they hereby are noted and entered; and the filing or presentation hereafter of any such claim or answer, except as hereinafter set forth, be and hereby is forever barred and restrained; and it is further

ORDERED that all parties, their agents, servants and attorneys, except ATLANTIC RICHFIELD CORPORATION, now having or pretending to have any claims against the Barge OCEAN 80 or OCEAN 80 CO. or INTERSTATE OIL TRANSPORT COMPANY or any of them arising out of the above mentioned occurrence are hereby perpetually restrained and enjoined from the institution or prosecution of any and all suits against the Barge OCEAN 80, OCEAN 80 COMPANY and INTERSTATE OIL TRANSPORT COMPANY in respect of such claims,

PROVIDED, HOWEVER, nothing herein shall be construed to prevent the prosecution and defense of the claims and counterclaims set forth in the suit entitled ATLANTIC RICHFIELD CORPORATION against GENERAL AMERICAN TRANSPORTATION CORPORATION now pending in this Court and bearing the Number 74 Civ. 4089; and it is further

ORDERED that the claim of ATLANTIC RICHFIELD CORPORATION against the Barge "OCEAN 80", OCEAN 80 CO. and INTERSTATE OIL TRANSPORT COMPANY in Index No. 73 Civ. 1832 be and it hereby is discontinued without costs to either party and without prejudice to the right of ATLANTIC RICHFIELD CORPORATION upon the conclusion of the litigation in the above mentioned suit bearing Index No. 74 Civ. 4089 to bring an action against OCEAN 80 COMPANY and/or INTER-

STATE OIL TRANSPORT COMPANY with the right to assert therein any claim it would have been entitled to assert immediately prior to the entry of this order, and INTERSTATE OIL TRANSPORT COMPANY and OCEAN 80 CO., shall have the right to assert in such action the partial defense of limitation of liability, and it is further

ORDERED, ADJUDGED and DECREED that all bonds or other security posted in 73 Civ. 1832, 72 Civ. 4615 and 75 Civ. 5186 be and they hereby are cancelled.

/s/ S. J. Ryan
U.S.D.J.

Consent is hereby given
to entry of the above:

VINCENT, BERG, RUSSO,
MARCIGLIANO AND ZAWAGKI

By /s/ Carmen Anthony Russo

HAIGHT, GARDNER, POOR & HAVENS

By /s/ Gordon W. Paulsen

Dated: New York, New York
May 12, 1977

Subsidiaries and Affiliates of Atlantic Richfield Company

ARCO Chemical Company
ARCO Alaska, Inc.
ARCO Oil & Gas Company
ARCO International Oil and Gas Company
ARCO Petroleum Products Company
ARCO Solar Nigeria Ltd.
ARCO Transportation Company
Anaconda Minerals Company
Lyondell Petrochemicals Company
Agro Internacional, S. de R. L. de C.V.
Alyeska Pipeline Service Company
Anamax Mining Company
Anamet, S.A. de C.V.
A/S Skaland Grafitiverk
Atlantic Richfield de Mexico, S. A. de C.V.
Badger Pipeline Company
Black Lake Pipe Line Company
Blair Athol Coal Pty., Limited
Caribou-Chaleur Bay Mines Ltd.
Centroamericana de Cobre, S.A.
Cobre de Hercules, S.A.
Cobrecel, S.A. de C.V.
Colonial Pipeline Company
Compania de Petroleo Ganso Azul, Ltda.
Compania Minera Dos Republicas S.A. de C.V.
Compania Minera Kappa S.A.
Cook Inlet Pipe Line Company
Cupro San Luis, S.A. de C.V.
Dexter de Mexico, S.A.
Dixie Pipeline Company
East Texas Salt Water Disposal Co.
85819 Canada Limited
Eisenhower Mining Company
Empresa de Comercio Exterior Mexicano, S.A. de C.V.

Flower Street Limited
Imperial Eastman de Mexico, S.A.
Impulsora De Cobre, S.A. de C.V.
Industrias Nacobre, S.A. de C.V.
Industrias Tecnos, S.A. de C.V.
Iricon Agency Ltd.
Kenai Pipe Line Company
Kronos, Computacion y Teleproceso, S.A. de C.V.
Kuparuk Transportation Company
Las Quintas Serenas Water Company
Lingobronce, S.A.
Logan Aluminum Inc.
Manufacturera Mexicana De Partes Para Automoviles, S.A. de C.V.
Minera Anaconda Limitada
Montoro, Empresa Para La Industria Quimica Nacional de Cobre, S.A.
Nihon Oxirane Company, Ltd.
P. T. Arutmin Indonesia
P. T. Elnusa Chemlink
Park-Cummings Mining Company
Park-Premier Mining Company
Platte Pipe Line Company
Prince Consolidated Mining Company
Productos Especiales Metalicos, S.A.
Rodman, Inc.
Servicios Industriales Nacobre, S.A.
Sinclair Venezuelan Oil Company
Smoke House Copper Mining Company
Solvamex, S.A. de C.V.
Sumiarco Company Limited
Swecomex, S.A.
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company
Tubos Flexibles, S.A.
William Prym de Mexico, S.A.